IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 846 OF 2003

Maharashtra Engineering Plastic
and General Kamgar Union,
Kakani Pada, Kurar Village,
Malad (East), Mumbai 400 097 ... Petitioner

Vs.

1. M/s. Little Kids,
Unit No. 39/48, Bismilla Building,
3rd Floor, Above Pinge's Classes,
Opp. Railway Station, Ranade Road,
Dadar (West), Mumbai 400 028.

2. Shri. Chandrakant Saiya,
Partner,
M/s. Little Kids,
Unit NO. 39/48, Bismilla Building,
3rd Floor, Above Pinge's Classes,
Opp. Railway Station, Ranade Road,
Dadar (West), Mumbai 400 028.

3. Shri. Harish Savla,
Partner,
M/s. Little Kids,
Unit No. 39/48, Bismilla Building,
3rd Floor, Above Pinge's Classes,
Opp. Railway Station, Ranade Road,
Dadar (West), Mumbai 400 028.

4. Shri. C.B. Havelikar,
Presiding Officer,
Tenth Labour Court,
Ground Floor, New Administrative
Building, Opp. Chetna College,
Bandra (East), Mumbai 400 051.

5. Shri. S.G. Kadam, Member,
Industrial Court, First Floor,
New Administrative Building,
Opp. Chetna College, Bandra (East),
Mumbai 400 051. ... Respondents

Mr. V.P. Vaidya for Petitioner.

Mr. A.S. Peerzada with Mr. B.V. Bukhari for
Respondents.

CORAM : F.I. REBELLO,J.
DATED : DECEMBER 17, 2004

ORAL JUDGMENT:

. The Petitioners had filed a complaint being Complaint No. 564 of 1998. The case of the complainant was that the respondents were employers. As the workman engaged by the employer were not being given benefits which they were entitled to under various Labour Legislatures such as benefits of E.S.I.C., Insurance and other benefits and some other benefits as set out in the plaint, the workman approached Shri. Chandrakant Saya and Shri.Harish Sawala, the Respondent partners in order to redress their genuine grievance on several occasions. As the workman found that their genuine grievances are not being settled, they enrolled themselves with the Petitioner Union. The Union by its letter of 4.9.1998 raised a complaint with the office of the Deputy Labour Commissioner against the employers and requested that their genuine grievance be redressed. It is also set out that the Respondent Nos. 2 and 3 are the partners of Respondent No. 1. They only brought to the notice of the employers that the workmen had joined Union and requested the employers to cooperate with the union to settle the genuine grievances of the workmen. Inspite of the communication, the union did not receive any response. The employer on coming to know that the workman had joined the union, respondent No. 2 started threatening workmen with the order of dismissal or discharge of service and

further other threats. The Union placed the same on record by their complaint dated 26.9.1998 sent to the employer by registered A.D. The workmen themselves thereafter collectively informed the employer that they had obtained membership of the Union and had authorised the union to represent them before the Management of the Respondents. Various demands were served on the employer. In response, it is contended by the Union that Respondent No. 2 deducted entire wages of the workman/Union Member, while paying monthly wages on 4.10.1998 against advance paid to them. This was brought to the notice of the Respondent No. 2 by the workmen upon which he threatened to dismiss them. The Union contends that the workmen were threatened that the gala will be sold and even legal dues which the workmen would be entitled to will not be paid to them to teach them a lesson for joining the membership of the Union. These facts were also placed on record by the Union by registered letter dated 5.10.1998. The Respondent employer were called upon to desist from these unfair labour practices. No heed however, was paid and Respondent No. 2 terminated services of the 17 workmen who were members of the Petitioner Union without following due process of law with effect from 6.10.1998. In the complaint, it is pointed out that terminating the services without following mandatory provisions of Industrial Disputes Act,

amounted to an unfair labour practice and that the employers be directed to reinstate the workmen whose names are appearing in Annexure A with full back wages and continuity of service from 6.10.1998 till they allow to resume their duties by the employer. In the complaint, Union has invoked Items 1(A), (B), (D) and (F) of Schedule IV of M.R.T.U. & P.U.L.P. Act, 1971.

2. Respondent No. 2 filed reply. It was his contention that he was proprietor of Respondent No. 1. It was set out that the complainant Union has wrongly impleaded respondent Nos. 1 and 2, as the workmen shown in list are not in the employment of Respondent No. 1 and as such the Respondent No. 1 and 2 are wrongly impleaded as party. It is then pointed out that the Respondent No. 3 is a total stranger to Respondent No. 1, a proprietary concern of which Respondent NO. 2 is a proprietor. It is also set out that the Respondent No. 1 has engaged eight employees in their employment and even though the provisions of E.S.I.S. Act are not applicable, they have been covered under the provisions of the Employees State Insurance Scheme. Rest of the averments have been dealt with. It is also pointed out that in the list of the workmen forwarded by the Union, two workmen were working with them and the said two workmen were absent from duty with effect from 6.10.1998 for no reasons and

without any explanation. The two workmen have been identified as Ishak Ahmed and Suryappa Birbal. In respect of the averment in the complaint in Para 3(a) that the employers had sister concern namely M/s. Teenage Fashion, the same was denied and the Union was put to the strict proof thereof.

. The Union came to file rejoinder in response to the affidavit in reply. It was denied that the complaint suffers from so called misjoinder or non joinder of the parties and also that the Respondent Nos. 1 and 2 had been wrongly impleaded. The Union also denied that the Respondent NO. 3 is total stranger. It was set out that the Respondent had been looking after the management of Respondent No. 1 and had given understanding to the affiant Ramesh Ramaiyya. The Respondent No. 1 and M/s. Dinesh Fashion are both sister concerns. and the manufacturing activities of both the concerns are the same and as per instructions of Respondent Nos. 2 and 3, the affiant and other co-workman whose names are shown in the Annexure A to the complaint had to work in both the units situated in Gala No. 39 and 48, Bismilla Building, 3rd Floor, Above Pinge's Classes, Opp. Rly. Station, Ranade Road, Dadar (West), Mumbai 400 028. It was also set out that Respondent Nos. 2 and 3 had disclosed to the affiant and his co-workmen that they are partners of Respondent No. 1 as well as M/s. Teenage

Fashion and all the workmen shown in the annexure A to the complaint had to work in both the units vice versa and payments of earned wages of the workmen also were being paid either by the Respondent No. 2 or Respondent No. 3 from time to time. It was also set out that the number of workman employed with Respondent No. 1 were 35 and it was denied that the Respondent No. 1 has engaged only 8 employees in their employment as alleged. It was also set out that the Annexure A to the complaint bears name of all 17 workmen who were working with Respondent Nos. 1, 2 and 3 as well as sister concern M/s. Dinesh permanently and their services were terminated by way of victimization as they had enrolled as members of complainant union. Considering the controversy, it is not necessary to advert to other averments.

3. At the outset, it may be pointed out that apart from 8 names listed under the E.S.I.S. records, the names admittedly of Ishak and Suryappa whom respondent nos. 1 and 2 admitted as been in employment were not included therein. The Petitioner union had examined Suryappa. In his evidence in chief he has averred that he was serving as Master with Respondent No. 1. He was working with other 35 employees and that Respondent Nos. 2 and 3 are partners and that he was member of the petitioner complainant. Out of the 35

employees, 17 are the members of the Union from 17.7.1998. He has averred the facts set out in the complaint and that letters of appointment were not given. He also set out that the respondent was giving work to others and the same work was going on in the place. He has produced documents about the work place. There was letters received from relatives at the address of the Respondent. He also stated that he was deposing on behalf of the workman for himself and other co-workmen whose services were terminated. The matter was adjourned for cross examination of the said witness. On the next date of hearing, as contended on behalf of the Petitioner Union, the representative of the employer filed an affidavit of the workman Suryappa who had been examined. In the said affidavit it is set out that Suryappa had received all his legal dues till the date of his submitting the resignation and the complaint against him be dismissed. The receipt for the same dated 21.3.2000 was also annexed. The said witness was notmade available for cross-examination.

. Respondent Nos. 1 and 2 thereafter on 14.3.2001 moved an application setting out that they have disputed the employment of the persons listed in the complaint and as such unless there is pre-adjudication on this issue of employment by the appropriate authority, the complaint filed by the

complainant above named cannot be said to be maintainable. Reply was also filed on behalf of the Petitioner Union. It was set out that Respondent No. 3 was not stranger to Respondent No. 1. They relied on the visiting cards given by the respondent to the workmen which have been filed on record in the list of document dated 13.1.2000 at Sr. No. 40 and 48. It will show that the respondent was carrying on business at the address. Several letters were received by the respondent written by the complainant. The names of both Respondent Nos. 1 and 2 have been mentioned. But the same was not disputed at any point of time by respondents prior to termination of the services of the workmen. Attention was also invited to the letters produced which were on record which were addressed to the workmen at the address set out in the complaint. It was also pointed out that name s of Ishak and Suryappa were not in the list included in Form No. 6 or E.S.I.C.

4. The learned Labour Court by order dated 28.12.2001 in Paragraph 8 has observed that the issues were framed and on the issues both parties did not adduce separate evidence but preferred to argue the matter on the present evidence on record. Therefore, the evidence for that purpose was not recorded and the matter is heard on both these

issues i.e.a s to whether the present Complainant is maintainable and Issue No. 4(b) as to whether the relationship of employer and employee has been established. The learned Judge noted under M.R.T.U. & P.U.L.P. Act at least it must be prima facie shown by the complainant that there exists relationship of employer and employee. It was further set out that the issue as to whether there is relationship of employer and employee can not be gone into under MRTU & PULP Act. The visiting cards were held not be evidence of employer and employee relationship. The letters received and addressed at the respondents business address, it was held cannot establish relationship between the person and the employer. It was stated that one workman who is presently any employee in the respondent, can collect such letters for other friends and those friends can claim tobe the workman of the Respondents and therefore, such evidence is not sufficient to show the relationship of employer and employee. Reference was also made to the name of Ishaq Ahmed and that respondents had admitted as employees though their names were not appearing in Form No. 6 of E.S.I.C. All this evidence was discarded. The learned Judge relied upon the judgments cited including in Vividh Kamgar Sabha Vs. Kalyani Steel Ltd. & anr. 2001 1 CLR 532 and thereafter came to the conclusion that the objection as raised by the Respondent ought to be

upheld and consequently dismissed the complaint. It is this order which is subject matter of the present challenge.

5. At the hearing of this petition, on behalf of the Petitioners, their learned counsel points out that the judgement in Kalyani (supra) and Cipla Ltd. Vs. Maharashtra General Kamgar Union and ors. 2001 1 CLR 754 would not be attracted to the facts of the present case. It is pointed out that in both the cases admittedly relationship of employer and employee was with another employer. In the case of Kalyani (supra) the Centeen workers claimed to be direct workmen though they were employed in the canteen by the contractor. Similarly in Cipla, admittedly the complaint was filed contending that the contract was sham and bogus and that the employees were direct employees of Cipla. It is therefore, submitted that these judgments would not apply on the fact of the present case where the complainants had contested that respondents are their workmen. Merely denial would not be sufficient. It was open to the complainant to produce evidence and in fact there was prima facie evidence to establish relationship of employer and employee and in these circumstances, the order of the Labour Court ought tobe set aside. It is secondly submitted that the workman who was examined by the complainant union

was one of those who admittedly was admitted by the respondent to be their workman though his name was not listed in ESIS records. The workman had deposed that he was working along with other 16 workmen whose names were listed in the complaint. Prima facie there was therefore, sufficient material and in the light of that, the learned Labour Court ought not to have proceeded to dispose of the issues without recording further evidence. It is submitted that petitioners did not have a fair opportunity of leading evidence.

. On the other hand, on behalf of the Respondents, their learned counsel submits that the complainants are not sure as to who is their employer considering the pleadings of the respondents themselves in the complaint and thereafter in the affidavit in rejoinder filed on behalf of the Respondent Nos. 1 and 2. It is pointed out that no material had been brought on record whatsoever to show any relationship between Respondent no. 1 and M/s. Dinesh Fashions or for that matter with M/s. Teenage Fashions. Considering the contention of the complainant themselves that t the workmen were working for both the units, it is contended that it cannot be said that the findings recorded by the learned Labour Court suffers from any error.

6. With the above, we may first consider whether

on the plea by the employer that the persons claimed to be workmen are not his workmen the complaint under the provisions of the MRTU & PULP Act is not maintainable and the remedy of such persons is to approach Industrial Tribunal on a reference by the appropriate Government. We may firstly consider the judgement in Kalyani and another. The learned Apex Court has been pleased to observe that the provisions of MRTU & PULP Act can only be enforced by persons who admittedly are workman. If there is dispute as to whether employees are employees of the company, then that must be got resolved by raising dispute before the appropriate forum. It is only after a proper forum decides the status will an application be maintainable under the provisions of M.R.T.U.& P.U.L.P. Act. The Judgement came to be delivered on 19.1.2001.

. The matter once came up before the Apex Court in Cipla Ltd. Vs. Maharashtra General Kamgar Union and Ors, 2001 1 CLR 754. That was the case admittedly of Contractor and employees. The contention of the Union was that the contract was sham and consequently they were direct employees of the appellant before the Apex Court. This view found favour with the Division Bench of this Court. The Apex Court observed that the case put forth by the workman is that they have been directly

employed by the appellant company. That the contract itself is sham and therefore, needs to be adjudicated. It is a matter which can be gone into by Industrial Court or the Labour Court. The said question cannot be examined by the Labour Court constituted under the Act. The Apex Court then observed that the object of the enactment is, amongst other aspects, enforcing provisions relating to unfair labour practice. If that is so, unless it is undisputed or indisputable that there is employer-employee relationship between the parties, the question of unfair practice cannot be inquired into at all. The court then noted that the Respondent Union came to the Labour Court with a complaint that the workmen are engaged by the appellant through the contractor and though that is ostensible relationship the true relationship is one of master and servant between the appellant and the workmen in question. The court held that exercise of repudiation of the contract with one and establishment of a legal relationship with another can be done, only in a regular Industrial Tribunal/Court under the Industrial Disputes Act.

. Subsequent to these judgements several judgements of the learned Single Judges of this Court came to be considered in Hindustan Coca Cola Bottling S/W pvt. Ltd. and anr. Vs. Narayan Rawal and Ors. 2001 II CLR 380. By considering

the judgment in Kalyan Steel (supra) and in Cipla (supra) the learned Division Bench of this court held that if the relationship of employer and employee is established before the Industrial Tribunal or Labour Court under the Industrial Disputes Act or the employee/employer relationship is indisputed or indisputable, then the complaint under M.R.T.U. & P.U.L.P. Act would be maintainable. The court hastened to add that if any time the employee was recognised by the employer and subsequently repsudiated such question would be incidental question arising under Section 32 of the Act and the Labour Court and the Industrial Court as the case may be is bound to decide the said question. However, in the case where the complaint is filed that employees of the contractors are direct employees of the Employer the court constituted under Section 28 of the MRTU Act will have no jurisdiction to entertain the complaint unless status of relationship gets determined in the proceedings under the Industrial Disputes Act.

. From the above it will therefore, be clear that there must be at the time of entertaining the complaint, where relationship is disputed, strong material in the form of at least documentary evidence to show existence of relationship of employer and workman. If such relationship does

not exist or is disputed, it will not be open to the court under M.R.T.U. & P.U.L.P. Act to examine the matter. In a case where the employee claims that though he is employed by the contractor, the contract is sham, then the complaint would not be maintainable. In cases other than contract workers where the employee disputes the relationshio, there must be strong prima facie evidence available before the court to entertain the complaint in order to determine the issue as to existence of relationship. If there is no documentary prima facie material, then it will not be open to the Labour Court to decide the issue.

7. It is in that context, that we must consider the present case. The petitioner Union had come to the court contending that Respondent No. 1 is partnership of which Respondent Nos. 2 and 3 are partners. No prima facie material was produced to that effect. It was further set out that the respondent company has a sister concern M/s. Teenage Fashions situated on same plot and premises managed by one common Management. Subsequent to the reply filed by the respondent, rejoinder came to be filed by the Union under which it was further pleaded that there was yet another concern M/s. Dinesh Fashions which is sister concern and that the workmen had to work for both i.e. they had to

work for Respondent No. 1 as well as sister concern M/s. Dinesh Fashions.It is no doubt true that the Respondent No. 1 admitted that two of the employees whose names are listed in ESIC list are their workmen. That issue by itself will not determine the existence of a relationship of others. The fact that one of such employee was examined as a witness and deposed that other workmen were working with him would make no difference as the said witness was not available for cross examination by the employer.

. Apart from that from the pleadings itself, it is not clear as to whether the workman represented by the Petitioner are employees of Respondent NO. 1 or M/s. Dinesh Fashions or of M/s. Teenage Fashions. If the test as laid down by the Apex Court in Kalyani (supra) and Cipla Ltd. (supra) are made applicable, then on the facts of the case, I do not find that there has been any error of law committed by the learned Labour Court. It was no doubt true that an objection was raised, that after the evidence had commenced, it was not open to the Labour Court to have answered the issue based on the application by the employer. The issue is one of cause of action. The issue of maintainability can be raised not only at the initial stage but even in the course of the proceedings. If that be the case, I do not find that the Labour Court had

committed any jurisdictional error.

. In the light of that, I find no merits in the petition. Rule discharged. No order as to costs.

(F.I. REBELLO,J.)